FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

STATE OF TEXAS, *et al.*,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Case No. 1:18-CV-68
	§	
UNITED STATES OF AMERICA, *et al.*,	§	
	§	
Defendants,	§	
	§	
and	§	
	§	
KARLA PEREZ, *et al.*,	§	
	§	
Defendant-Intervenors,	§	
	§	
and	§	
	§	
STATE OF NEW JERSEY,	§	
	§	
Defendant-Intervenor.	§	

DEFENDANT-INTERVENORS' MOTION TO COMPEL DISCOVERY FROM PLAINTIFF STATE OF TEXAS AND TO DISMISS ALL OTHER PLAINTIFF STATES

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I. STATEMENT OF THE ISSUES TO BE RULED UPON BY THE COURT

Since June 2018, Plaintiff States have provided no discovery documents or new information to Defendant-Intervenors Karla Perez, *et al.* ("Defendant-Intervenors"). Despite this Court acknowledging in its opinion denying Plaintiff States' Motion for Preliminary Injunction that further discovery was needed, and setting a robust discovery schedule thereafter, Plaintiff States have continued to obstruct discovery in an effort to rush this matter to summary judgment on a preliminary injunction record. Particularly in light of Plaintiff States' pending—and premature—Motion for Summary Judgment, Defendant-Intervenors respectfully request that the Court compel the State of Texas to participate in discovery. Specifically, Defendant-Intervenors request that the Court compel the State of Texas to answer Interrogatories Nos. 4-15 and 18-21, produce discovery responsive to Requests for Production Nos. 2 and 8, and supplement previous unverified and deficient responses. *See* Ex. 11 at 6-19; Ex. 15 at 8-10. Defendant-Intervenors further request that the Court order Plaintiffs to verify their answers and to specify in their responses and objections when they are unable to produce the discovery requested by Defendant-Intervenors because the information Defendant-Intervenors seek does not exist.

In addition, Defendant-Intervenors request that the Court dismiss the Plaintiff States other than Texas from the case or enter an order now declaring that the other Plaintiff States lack standing to pursue their claims.

Defendant-Intervenors also request that the Court extend all deadlines in the Rule 16 scheduling order for a period of time equal to the number of days between the filing of this motion and the day Texas produces a complete, supplemental production to Defendant-Intervenors. Finally, Defendant-Intervenors request that the Court order Plaintiff States to pay reasonable expenses incurred by Defendant-Intervenors in connection with this motion. *See* Fed. R. Civ. P. 37(d)(3); Fed. R. Civ. P. 37(c)(1)(A).

II. SUMMARY OF THE ARGUMENT

During the preliminary injunction phase of this case, Plaintiff States claimed that further discovery would only be appropriate following resolution of their Motion for Preliminary Injunction; following this Court's denial of that Motion, Plaintiff States now claim that no further discovery is warranted. The contradictory positions taken by Plaintiff States before and after denial of their Motion for Preliminary Injunction make clear their overt and transparent effort to evade the ordinary discovery process. This Court should not countenance such a subversion of the process.

During this current discovery period, Defendant-Intervenors have sought responses to their previously-served discovery, and have also, consistent with this Court's scheduling order, propounded new discovery requests. Plaintiff States improperly refuse to provide the requested discovery. Plaintiff States have also refused entirely to provide any discovery relating to Plaintiff States other than the State of Texas, acting as though these additional Plaintiffs are immune from any discovery obligations despite their decision to participate as parties in this action.

Defendant-Intervenors are entitled to discovery that is relevant to their claims so long as the materials are not privileged and are proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). The refusal by Texas to respond to Defendant-Intervenors' outstanding discovery requests, with the erroneous argument that no genuine issues of material fact exist and that the Court has already issued a final ruling on Texas's standing, is without merit. *See* Ex. 9; Ex. 16 at 6-11. The discovery Defendant-Intervenors seek goes to critical (and not yet decided) issues in the case, including Texas's standing and the scope of any potential remedy. In addition, the complete failure of states other than Texas to participate in discovery warrants their dismissal or, at the very least, an order concluding that these states lack standing.

III. STATEMENT OF THE NATURE AND STAGE OF PROCEEDINGS

A. At the beginning of this case, the parties conducted limited, expedited discovery and Plaintiff States provided only a handful of paper discovery

On May 30, 2018, this Court ordered the parties to conduct limited expedited discovery related to Plaintiff States' motion for a preliminary injunction. *See* Dkt. 53. Pursuant to that order, Defendant-Intervenors served several discovery requests on Plaintiff States. *See* Exs. 1-4.

Plaintiff States provided only a few documents in response to these requests, and in each case justified their withholding by alluding to their intention—now apparently abandoned, given their pending Motion for Summary Judgment—to participate in a more fulsome discovery process during "the normal discovery period:"

- First Set of Discovery Requests. Defendant-Intervenors first set of interrogatories tracked the language in Federal Rule of Civil Procedure 26(a) related to initial disclosures, and asked Plaintiff States to produce documents identified in their answers to those interrogatories. *See* Ex. 1 at 6-9. In response to Defendant-Intervenors' request to produce these documents, Plaintiff States referred to their complaint and their motion for preliminary injunction. *Id.* at 9. Beyond pointing to these materials, Plaintiff States produced only ten documents. [1] Plaintiff States did not explain whether further

[1] Those ten documents were: (1) a chart from the Texas Education Agency from February 2018; (2-4) three publicly available reports from the Department of Homeland Security (DHS) titled "Estimates of the Unauthorized Immigrant Population Residing in the United States" as of January 2006, 2011, and 2012; (5) a 2006 report from the Texas Office of the Comptroller titled "Undocumented Immigrants in Texas: A Financial Analysis of the Impact of the State Budget and Economy;" (6) a public report from the U.S. Department of Health and Human Services, Office of Refugee Resettlement, showing the total number of unaccompanied minors released to sponsors from

responsive documents exist and were being withheld, but noted that "Plaintiffs may supplement this response, if necessary, with additional information once this case proceeds to the normal discovery period . . . ." *Id.*

- Second Set of Discovery Requests. In response to Defendant-Intervenors' interrogatories and requests for documents related to Plaintiff States' labor market distortion claims and alleged costs incurred as a result of DACA, Plaintiff States generally objected to these requests on the basis that the requests sought information "outside the scope of limited expedited discovery." *See* Ex. 2 at 6-18. Subject to these objections, Plaintiff States produced only 6 documents in response to these requests.[2] Again, Plaintiff States did not explain whether further responsive documents exist and were being withheld, and represented that they "may supplement [their] response[s] as expedited discovery proceeds and . . . once this case proceeds to the normal discovery period after the Court's ruling on the motion for preliminary injunction." *Id.*[3]

B. The Court entered a discovery schedule after denying Plaintiff States' requests for summary judgment and a preliminary injunction

In November 2018, the Court entered a Rule 16 scheduling order that provided for a discovery deadline of August 21, 2019. *See* 11-14-18 Minute Entry (setting Scheduling Order and Trial Settings); *see also* Dkt. 343 (noting that "a scheduling order is now in place"). The

October 2014-January 2018 by state; and (7-10) four charts which appear to relate to Texas school finance. *See* Ex. 18 ¶ 3.

[2] Specifically, Plaintiff States produced: (1) a chart from the 2016 American Community Survey for Texas showing the total number of U.S. citizens and undocumented immigrants in the state as of 2016; (2-5) four Excel spreadsheets with no description; and (6) a publicly available report from DHS titled "Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2014." *See* Ex. 18 ¶ 2. Plaintiff States also again referred Defendant-Intervenors to Plaintiff States' complaint and motion for preliminary injunction. *See* Ex. 2 at 6-18.

[3] Defendant-Intervenors' third set of discovery requests tracked the language in the Federal Rules related to expert disclosures and asked Plaintiff States to identify information related to Plaintiff States' experts at the preliminary injunction stage. *Compare* Ex. 3 *with* Fed. R. Civ. P. 26(a)(2), 26(b)(4)(C). Defendant-Intervenors' fourth set of discovery requests are one narrow interrogatory and two narrow requests for production related to Texas public education costs. *See* Ex. 4. Neither of these two sets of discovery requests is at issue in this motion.

Court subsequently set a new discovery deadline of September 9, 2019, after Federal Defendants failed to cooperate with discovery because of the lapse in congressional appropriations. *See* Dkt. 367. At least four months of discovery remain under that extended deadline.

C. Plaintiff States have provided no new documents or information in the current discovery period

1. Plaintiff States provided deficient initial disclosures

On November 6, 2018, Plaintiff States served their initial disclosures. Ex. 5. Plaintiff States generally objected to producing initial disclosures on the basis that "controlling issues [in the case] are legal questions or questions of fact that are not in genuine dispute." *Id*. at 4. Plaintiff States further asserted that "[t]o the extent that any factual information is discoverable," the individuals likely to have discoverable information "are those who Plaintiffs disclosed on their [preliminary injunction] witness lists as well as the witnesses who submitted declarations in the briefing over Plaintiffs' motion for preliminary injunction." *Id*. As to the location and category of discoverable documents and tangible items, Plaintiff States merely referred Defendant-Intervenors to exhibits to Plaintiff States' motion for preliminary injunction. *Id*.

2. Plaintiff States failed to supplement their responses to discovery requests served by Defendant-Intervenors during expedited discovery

Although Plaintiff States were obligated to supplement their responses to the expedited discovery requests, and they promised to do so, Plaintiff States have provided no interrogatory responses or documents to Defendant-Intervenors since June 29, 2018. *See* Ex. 18 ¶¶ 6-7.

On November 12, 2018, Plaintiff States served on Defendant-Intervenors amended objections and responses to several of Defendant-Intervenors' discovery requests, including the requests related to Plaintiff States' alleged costs resulting from DACA and labor market distortion claims. *See* Exs. 10-13. These responses included no new documents or interrogatory responses. *Compare* Ex. 2 at 6-18 (stating Plaintiff States "may supplement [their] response[s] as expedited discovery proceeds and . . . once this case proceeds to the normal discovery period after the Court's ruling on the motion for preliminary injunction.") with Ex. 11 at 6-19 (reiterating objections and citing to e-court filings).

Plaintiff States make boilerplate objections that the discovery requests are overly broad, burdensome and outside the scope, but do not support these objections with a declaration, affidavit, or other evidence, and do not specify the nature of the burden or overbreadth. *See* Ex. 11 at 6-19. Plaintiff States also assert that they need not respond to this discovery, because the Court has already "acknowledged" that Plaintiff States "have clearly shown that their injury is more than the identifiable trifle needed to establish standing." *Id.* In addition, Plaintiff States did not verify their answers to any of Defendant-Intervenors' interrogatories. *See* Fed. R. Civ. P. 33(b)(5).

D. Plaintiff States failed to respond to discovery served on them during this regular discovery period

On February 1, 2019, Defendant-Intervenors served on Plaintiff States a fifth set of discovery requests relevant to work-study program and border security costs. *See* Ex. 15. Plaintiff States asserted these costs for the first time after expedited discovery had concluded. *See* Dkt. 218 at 33, 45; *see also* Dkt. 288 at 12, n. 2.[4]

On March 4, 2019, Plaintiff States served their responses and objections to Defendant-Intervenors' fifth set of discovery requests. *See* Ex. 16. Plaintiff States produced no responsive discovery and objected to these requests on the basis that the requests are broad, burdensome, and outside the scope of discovery because these requests "are only relevant to standing, an issue already decided by this court." *Id.* at 6-11.

[4] Three days later, Plaintiff States filed their motion for summary judgment. *See* Dkt. 356.

E. Plaintiff States recycled two experts (neither of whom offers an opinion about education, law enforcement, health care, or border security costs) and identified fact witnesses that purport to offer testimony on costs only as to the State of Texas

Pursuant to the Court's scheduling order, Plaintiff States served their expert disclosures on Defendant-Intervenors on March 19, 2019. *See* Ex. 17. Plaintiff States disclosed two experts, Dr. Donald Deere and Dr. Lloyd B. Potter, both which had previously offered an expert opinion in this case at the preliminary injunction stage. *See id.*; Dkt. 358-21; Dkt. 358-31. Dr. Potter is an appointed State Demographer of Texas who offers an opinion about the likelihood that DACA recipients will return to their country of origin. Dkt. 358-31 at ¶¶ 2-11. Dr. Deere is an economist who offers an opinion about the labor market impact of DACA and the employer mandate provision of the Affordable Care Act. *See* Dkt. 358-21 ¶¶ 5, 13. Neither of these experts offers an opinion about education, law enforcement, health care, or border security costs to any Plaintiff States as a result of DACA.

Plaintiff States have also identified two lay witnesses, Ms. Monica Smoot and Mr. Leonardo R. Lopez, as persons likely to have discoverable information in the case. *See* Ex. 5; Dkt. 7 at 21-30. Neither of these witnesses offers testimony about law enforcement or border security costs to the State of Texas, let alone testimony about *any* costs to the other Plaintiff States.

F. Defendant-Intervenors attempted to obtain responses to their discovery requests

Because Plaintiff States only identified witnesses and produced documents related to Texas in their initial disclosures, on November 2, 2018, Defendant-Intervenors wrote to Plaintiff States asking them to provide initial disclosures for all other Plaintiff States. *See* Ex. 6. On

November 12, 2018, Plaintiff States responded to Defendant-Intervenors, summarily stating that Plaintiff States' initial disclosures "were provided on behalf of all Plaintiff States." Ex. 7.[5]

On February 1, 2019, Defendant-Intervenors sent a letter to Plaintiff States detailing a number of deficiencies in Plaintiff States' responses and objections to Defendant-Intervenors' discovery requests. *See* Ex. 14. It was not until March 4, 2019—a month after filing their motion for summary judgment and more than a month after Defendant-Intervenors sent Plaintiff States their deficiency letter—that Plaintiff States sent a response letter to Defendant-Intervenors, stating that Plaintiff States' amended responses and production "do not require supplementation, as there are no genuine issues of material fact that require additional development before the Court can rule on Plaintiff States' claims as a matter of law" as set forth in Plaintiff States' motion for summary judgment. *See* Ex. 9.

IV. LEGAL STANDARD

Pursuant to Rule 26 of the Federal Rules of Civil Procedure, Defendant-Intervenors are entitled to discovery that is relevant to their claims so long as the materials are not privileged and are proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Discovery rules "are to be accorded a broad and liberal treatment." *Schlagenhauf v. Holder*, 379 U.S. 104, 114 (1964). This Court "has broad discretion in discovery matters." *Scott v. Monsanto Co.*, 868 F.2d 786, 793 (5th Cir. 1989).

A party seeking to resist discovery bears the burden of showing specifically how each discovery request is not relevant or otherwise objectionable. *See McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990) (finding conclusory recitation of burdensomeness, relevancy, and overbreadth inadequate); *see also Merrill v. Waffle House, Inc.*, 227 F.R.D. 475, 478 (N.D. Tex. 2005) (stating that the Fifth Circuit does not employ a burden shifting approach; the burden of resisting discovery remains on the party opposing discovery at all times).

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[5] Defendant-Intervenors subsequently sought clarification from Plaintiff States regarding, among other things, whether Plaintiff States intended to rely on any declarations from other states from the *Texas I* litigation. *See* Ex. 8. Plaintiff States represented that "[c]onsistent with [Plaintiff States'] representations . . . in the past, Plaintiff[s] do not intend to rely on those declarations at this time." Ex. 9.

If a party fails to answer an interrogatory or fails to produce documents, the aggrieved party may move for an order to compel discovery from the Court under Rule 37. *See* Fed. R. Civ. P. 37(a)(3)(B). For purposes of Rule 37, an evasive or incomplete disclosure, answer, or response is treated as a failure to disclose, answer, or respond. *See* Fed. R. Civ. P. 37(a)(4). Failure to produce discovery is "not excused on the ground that discovery was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c)." Fed. R. Civ. P. 37(d)(2).

V. ARGUMENT

A. Defendant-Intervenors are entitled to discovery pursuant to this Court's Rule 16 Scheduling Order

The State of Texas categorically refuses to respond to Defendant-Intervenors' outstanding discovery requests, with the erroneous argument that no genuine issues of material fact exist and that the Court has already issued a final ruling on Texas's standing. *See* Ex. 9; Ex. 16 at 6-11. Texas's wrongful withholding of information on this basis is without merit for a number of reasons and Defendant-Intervenors are entitled to an order compelling Texas's responses.

1. The preliminary injunction record is replete with genuine disputes as to material facts

First, as more fully set forth in Defendant-Intervenors' motion to defer consideration of summary judgment, which Defendant-Intervenors herein incorporate by reference, fundamental facts are yet unknown, precisely because Plaintiff States refuse to cooperate in the discovery process. *See* Dkt. 363 at 3. Even based on the limited discovery obtained to date, the current, preliminary injunction record is replete with "genuine disputes as to [] material fact[s]" that would, without further supplementation, preclude entry of summary judgment on the merits. *See* Dkt. 363 at 7 (citing Fed. R. Civ. P. 56(a); *Lynch Props., Inc. v. Potomac Ins. Co. of Illinois*, 140 F.3d 622, 625 (5th Cir. 1998)). In its opinion denying Plaintiff States' motion for preliminary injunction, the Court repeatedly noted that the record upon which Plaintiff States now seek final resolution was preliminary, incomplete, and required supplementation before a final resolution could be reached. *See, e.g.*, Dkt. 319 at 115 ("Here, the egg has been scrambled. To try to put it back in the shell *with only a preliminary injunction record*, and perhaps at great risk to many, does not make sense nor serve the best interests of this country.") (emphasis added); *id.* at 31 (analyzing standing "[a]t the preliminary injunction stage"). The Court expressly contemplated that the record would be supplemented by further discovery and highlighted critical facts that remain uncertain and unresolved. *See, e.g.*, *id.* at 106 ("The Defendant-Intervenors maintain that Texas, the only state that attempted to prove damages, did not suffer any real loss on a net basis, and that these costs are more than offset by the economic advantages that Texas derives from the DACA recipients, a position on which they may ultimately be proven correct when this case is tried on the merits."). Prior to a final judgment on the merits, and during the period set by this Court's Scheduling Order for this very purpose, Defendant-Intervenors should be allowed to obtain discovery to illuminate these issues.

Plaintiff States' transparent efforts to evade participating in the discovery process during the period set by this Court, despite earlier having expressed the intention to provide additional discovery during the "normal discovery period," should be rejected wholesale.

2. *Discovery is not stayed in this case*

Second, Plaintiff States are wrong to withhold discovery based on the claim that discovery is supposedly stayed in this case pending resolution of their premature motion for summary judgment.[6] Discovery is not stayed, and Plaintiff States cannot automatically simply truncate the discovery process by filing such a motion. *See Areizaga v. ADW Corp.*, No. 3:14-CV-2899-B, 2016 WL 3536859, at *2 (N.D. Tex. June 28, 2016) ("[F]iling a Federal Rule of Civil Procedure 56 motion for summary judgment does not automatically stay discovery until the motion is resolved"); *Stambler v. Amazon.com, Inc.*, No. 2:09-CV-310 DF, 2011 WL 10538668, at **4, 8, 10 (E.D. Tex. May 23, 2011) (granting motion to compel in favor of plaintiffs, noting that defendants "cite no authority for the proposition that the responding party can craft its own remedy by deciding which interrogatories (or subparts) to answer and which to ignore" and by "unilaterally undert[aking] the balancing analysis of Rule 26" and "impos[ing] non-production as 'self-help' sanction"); *see also Kramer v. NCS Pearson, Inc.*, No. CIV. 03-1166 JRTFLN, 2003 WL 21640495, at *2 (D. Minn. June 30, 2003) ("Discovery is not automatically placed on hold while alternate motions are pending.") (collecting cases).

Discovery is ongoing pursuant to this Court's scheduling order, and Plaintiff States must produce all non-privileged material that is relevant to Defendant-Intervenors' requests. Plaintiff States have not moved for a stay of discovery or for a protective order in this case, and they impermissibly impose non-production as self-help. *See* Fed. R. Civ. P. 37(d)(2) (failure to answer and produce discovery is "not excused on the ground that discovery was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c)"); *Harmon v. Georgia Gulf Lake Charles L.L.C.*, 476 F. App'x 31, 39 n. 4 (5th Cir. 2012) (noting that litigants are not "free to engage in 'self-help,' . . . in light of perceived failures by the opposing party in the discovery process"); *Lopez v. Don Herring Ltd.*, 327 F.R.D. 567, 581 (N.D. Tex. 2018) ("[A] party cannot refuse to engage in—and is not excused from being subjected to—discovery simply because the discovery is relevant to a claim on which the resisting party believes that he will or should prevail.").

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[6] *See* Ex. 9 at 2 ("The parties can discuss whether supplementing discovery responses is needed should the Court rule that additional discovery is required on Plaintiff States' standing.")

Plaintiff States' withholding of information on the basis that no issues of material fact exist, and that standing is proven with the information on the preliminary injunction record, violates the Federal Rules, this Court's order, and basic notions of fairness.

3. Defendant-Intervenors' requests are relevant to Plaintiff States' claims on the merits

Finally, Texas is mistaken in assuming that the information Defendant-Intervenors seek is only relevant to standing. Even if Plaintiff States ***were*** correct in asserting that this Court has made a final ruling as to Texas's standing (which they are not), the evidence Defendant-Intervenors seek is relevant to the merits of Plaintiff States' claims, including the balance of the equities and whether DACA causes Plaintiff States irreparable harm. *See Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 546 n. 12 (1987) (noting the standard for a permanent injunction is essentially the same for a preliminary injunction, except the plaintiff must show actual success on the merits rather than a likelihood of success"); *Flowserve Corp. v. Hallmark Pump Co.*, No. 4:09-CV-0675, 2011 WL 1527951, at *9 (S.D. Tex. Apr. 20, 2011) (same). Instead, as Plaintiff States' own, former references to the "normal discovery period" demonstrate, additional discovery on the factors relevant to the preliminary injunction standard is wholly appropriate and common following denial of such a motion.

The scope of Plaintiff States' harm is also critical for this Court's determination of the appropriate scope of the remedy Plaintiff States seek. *See OCA-Greater Houston v. Texas*, 867

F.3d 604, 616 (5th Cir. 2017) (vacating injunction by district court and holding injunction must not "exceed[] the scope of the [plaintiffs'] harm."). Therefore, Plaintiff States' claim that standing is a settled matter is, aside from being incorrect in the context of a final judgment, simply not a proper basis for withholding discoverable information.

B. Plaintiff States' additional objections are without merit

Plaintiff States' additional objections are also without merit. As more fully set forth in Defendant-Intervenors' February 1, 2019 deficiency letter to Plaintiff States (*see* Ex. 14), which Defendant-Intervenors incorporate by reference, Plaintiff States' remaining responses and objections are similarly insufficient because:

- Plaintiff States make boilerplate objections about overbreadth and burden but do not support their objections with the necessary affidavits or other evidence describing specifically the nature of the overbreadth or burden. *See McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990) (party resisting discovery must show specifically how each interrogatory is not relevant or how each question is overly broad, burdensome or oppressive) (citation omitted); *Alonso v. Agrigenetics, Inc.*, No. B-04-005, 2004 WL 2668801, at *2 (S.D. Tex. Nov. 15, 2004) ("[O]bjections must be accompanied by affidavits or other evidence revealing the nature of why the discovery is objectionable."); *Lopez*, 327 F.R.D. at 580 ("A party resisting discovery must show how the requested discovery is overly broad, unduly burdensome, or oppressive by submitting affidavits or offering evidence revealing the nature of the burden.").

- Plaintiff States provide responses "subject to and without waiving their objections," and this language is evasive and not allowed by the Federal Rules of Civil Procedure. *See Lopez*, 327 F.R.D. at 580 ("[R]esponding to interrogatories . . . 'subject to' and/or 'without waiving' objections is manifestly confusing (at best) and misleading (at worse), and has no basis at all in the Federal Rules of Civil Procedure.") (internal quotations omitted).

- Plaintiff States respond by incorporating by reference their complaint and motion for preliminary injunction, but general references to filings in this case amount to an evasive and incomplete response. *See* Fed. R. Civ. P. 33(b)(3) (interrogatories must "be answered separately and fully in writing under oath"); *see also* Fed. R. Civ. P. 33(d)(1) (allowing a party to respond to an interrogatory by specifying business records in limited situations and requiring the party to "specif[y] the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could"); Fed. R.

Civ. P. 37(a)(4); *Meltzer/Austin Rest. Corp. v. Benihana Nat. Corp.*, No. A-11-CV-542-LY, 2013 WL 2607589, at *7 (W.D. Tex. June 10, 2013) (determining that interrogatory response that incorporated references to complaint was insufficient).

- Some of Defendant-Intervenors' requests ask Plaintiff States to identify costs by each Plaintiff, but Plaintiff States do not provide this breakdown; instead, Plaintiff States provide "examples" of costs to the State of Texas or purport to summarize the preliminary injunction record. These responses are evasive and incomplete. *See* Fed. R. Civ. P. 37(a)(4).

- Plaintiff States did not verify their responses. *See* Fed. R. Civ. P. 33(b)(5) ("The person who makes the answer must sign them . . . ."); Fed. R. Civ. P. 33(b)(3) (requiring each interrogatory to be answered under oath). All Plaintiff States must provide signatures from the individual or individuals who answered for each Plaintiff. *See* Fed. R. Civ. P. 33(b); *Wilson v. Navika Capital Grp., LLC*, No. 4:10-CV-1569, 2014 WL 223211, at *7 (S.D. Tex. Jan. 17, 2014) (ordering verification by all plaintiffs on penalty of dismissal); *Martinez v. Salazar*, No. 1:14-CV-00534 KG/WPL, 2015 WL 13638319, at *2 (D.N.M. Apr. 28, 2015) ("Rule 33 is clear that interrogatories must be answered and signed by the party to whom they are directed."); *Krank v. Fulton Bank*, No. 89-2871, 1989 WL 149941, at *1 (E.D. Pa. Dec. 11, 1989) ("[I]t is clear that interrogatories may not generally be answered jointly where joint affirmance leaves unclear which party has the information provided.").

- Plaintiff States' responses do not address all the Interrogatory subparts and are therefore incomplete and insufficient. *See* Fed. R. Civ. P. 37(a)(4).

- Plaintiff States make a number of general objections that are not connected to any one request in particular. These boilerplate, general objections do not comply with the Federal Rules of Civil Procedure, and are therefore insufficient to justify Plaintiff States' deficient answers and production. *See* Fed. R. Civ. P. 33(b)(4) ("The grounds for objecting to an interrogatory must be stated with specificity."); *Lopez*, 327 F.R.D. at 578 ("General or boilerplate objections are invalid."); *Simon v. State Farm Lloyds*, No. 7:14-CV-251, 2015 WL 12777219, at *4 (S.D. Tex. Apr. 9, 2015) (determining that plaintiff was "flagrantly abusing the discovery process by indiscriminately levying general objections") (internal quotations omitted); *Hall v. Louisiana*, No. 12-657-BAJ-RLB, 2014 WL 2560579, at *1 (M.D. La. June 6, 2014) ("This prohibition against general objections to discovery requests has been long established.").

In addition, Plaintiff States do not explain when they fail to produce documents because those documents do not exist. *See Enron Corp. Savings Plan v. Hewitt Associates, LLC*, 258 F.R.D.1 149, 166 (S.D. Tex. 2009) (finding defendant's "boilerplate objections lack merit" where plaintiffs argued that defendants "failed to disclose whether responsive documents exist"); *Bacharach v. SunTrust Mortg., Inc.*, No. CIV.A. 14-0962, 2015 WL 1843007, at *4 (E.D. La. Apr. 22, 2015) (where party made inadequate objections and did not state the information requested does not exist, granting motion to compel).

C. Plaintiffs Alabama, Arkansas, Louisiana, Nebraska, South Carolina, West Virginia, Kansas, and Mississippi should be dismissed

In the Fifth Circuit, courts have an obligation to affirmatively dismiss parties who do not have standing. *See Nat'l Rifle Ass'n of Am., Inc. v. McCraw*, 719 F.3d 338, 344 n. 3 (5th Cir. 2013) ("While *EPA* and *Bowsher* give courts license to *avoid* complex questions of standing in cases where the standing of others makes a case justiciable, it does not follow that these cases permit a court that *knows* that a party is without standing to nonetheless allow that party to participate in the case") (emphasis in original); *Veasey v. Perry*, 29 F. Supp. 3d 896, 902 (S.D. Tex. 2014) (dismissing plaintiff counties for lack of standing and noting that "[w]hile one plaintiff with standing may satisfy the Court's Article III jurisdiction, the Court still has the obligation to police its docket and dismiss parties who do not have standing.").

Plaintiffs Alabama, Arkansas, Louisiana, Nebraska, South Carolina, West Virginia, Kansas, and Mississippi have made no effort to show they have standing and to call for an injunction halting DACA, and have to date produced no information supporting such standing. As a threshold matter, none of these Plaintiff States even plead any injuries resulting from DACA with the requisite specificity. The only allegations about harm to Alabama, Arkansas, Louisiana, Nebraska, South Carolina, West Virginia, Kansas, and Mississippi in Plaintiff States' operative complaint are conclusory claims about harm to "Plaintiff States." *See, e.g.*, Dkt. 104 ¶ 221 ("DACA imposes significant costs on Plaintiff States"); *id.* ¶ 228 ("Plaintiff States have incurred considerable financial injuries on education, healthcare, and law-enforcement costs caused by DACA"); *id.* ¶ 231 ("Plaintiff States" incur financial costs "particularly education, healthcare, and law-enforcement costs").

In addition, since Plaintiff States filed this case a year ago, these Plaintiff States have not identified persons likely to have discoverable information or documents they may use to support their standing. These Plaintiff States have also not made any expert disclosures, offered any fact witnesses, or produced any reports or information relevant to their standing. In its order denying Plaintiff States' motion for a preliminary injunction, this Court recognized these Plaintiffs have made no effort to show their standing. *See* Dkt. 319 (Opinion and Order) at 31 ("[T]he States have centered their standing arguments around DACA's impact in Texas[.]"); *see also* Dkt. 357 (Pls' MSJ) at 37 (arguing that the "evidence introduced by the Plaintiff States showed that Texas bears hundreds of millions of dollars in costs providing social services to unlawfully present aliens" but not making the same claim as to other Plaintiff States). Because the record has not changed since the Court issued its memorandum and opinion on Plaintiff States' motion for preliminary injunction, Plaintiffs Alabama, Arkansas, Louisiana, Nebraska, South Carolina, West Virginia, Kansas, and Mississippi cannot show they have standing.

The standing of these Plaintiff States is not inconsequential because, as noted above, their alleged harms also bear on the merits of Plaintiff States' request for permanent injunctive relief and the scope of the remedy Plaintiff States seek. The Court must fashion a remedy consistent with the evidence of harm to the parties in the case. *See OCA-Greater Houston*, 867 F.3d at 616. The parties dispute the appropriate scope of the necessary injunction were Plaintiff States to prevail on the merits. *Compare, e.g.,* Dkt. 104 at 73 (requesting nationwide injunction) *with* Dkt. 217 at 3 (requesting the Court to limit injunctive relief to "DACA recipients as to whom

Plaintiffs have demonstrated standing.").[7] Therefore, allowing Plaintiffs Alabama, Arkansas, Louisiana, Nebraska, South Carolina, West Virginia, Kansas, and Mississippi to remain in the case when they do not have standing to sue would be highly prejudicial to Defendant-Intervenors.

In the alternative to dismissal, Defendant-Intervenors request that the Court order that Plaintiffs Alabama, Arkansas, Louisiana, Nebraska, South Carolina, West Virginia, Kansas, and Mississippi do not have standing and may not participate in the case by offering evidence or argument on Plaintiff State of Texas's claims.[8] Even if it is appropriate for the additional Plaintiff States to remain as technical parties due to Texas' standing, it is wholly inappropriate for the participation of these parties to impact the scope of Plaintiff States' requested relief (*i.e.*, arguing that DACA causes nationwide harm, including to all Plaintiff States) where Plaintiff States other than Texas have refused to provide any discovery to support such claims. In any event, Defendant-Intervenors should not be prejudiced by the participation of parties that lack standing and have opted out of discovery.

VI. CONCLUSION

For the foregoing reasons, Defendant-Intervenors respectfully request that the Court compel the State of Texas to answer Defendant-Intervenors' second and fifth sets of discovery requests, and supplement its production. *See* Exs. 11 & 15. Specifically, Defendant-Intervenors request that the Court compel the State of Texas to answer Interrogatories Nos. 4-15 and 18-21 and to produce discovery responsive to Requests for Production Nos. 2 and 8. Defendant-

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[7] *See also* Application for a Stay at 24-25, *Trump v. Stockman*, No. 18-678 (noting that "[n]ationwide injunctions… transgress both Article III and longstanding equitable principles by affording relief that is not necessary to redress any cognizable, irreparable injury to the parties in the case."); Ex. 19 (U.S. Dep't of Justice, Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions (September 23, 2018)) (noting the department's "considered and longstanding position" against nationwide injunctions).

[8] These Plaintiff States may pursue the option of filing an amicus brief if they want to present information to the Court.

Intervenors further request that the Court order Plaintiff States to verify their answers and to specify in their responses and objections whether they are unable to produce the discovery requested by Defendant-Intervenors because the information Defendant-Intervenors seek does not exist.

In addition, Defendant-Intervenors request that the Court dismiss all other Plaintiff States from the case or enter an order declaring that the other Plaintiff States lack standing.

Particularly in light of Plaintiff States' pending Motion for Summary Judgment—which, if granted, would result in a finding that there are no disputes of material fact—Defendant-Intervenors also request that the Court extend all deadlines in the Rule 16 scheduling order for a period of time equal to the number of days between the filing of this motion and the day Texas produces a complete, supplemental production to Defendant-Intervenors. Finally, Defendant-Intervenors request that the Court order Plaintiff States to pay reasonable expenses incurred by Defendant-Intervenors in connection with this motion. *See* Fed. R. Civ. P. 37(d)(3); Fed. R. Civ. P. 37(c)(1)(A).

Dated: May 14, 2019

Respectfully Submitted,

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CERTIFICATE OF CONFERENCE

I, the undersigned, hereby certify that, on February 1, 2019, counsel for Defendant-Intervenors emailed Todd L. Disher, counsel for Plaintiffs, a deficiency letter stating why Plaintiffs' objections and responses to Defendant-Intervenors' second set of discovery requests are deficient. *See* Ex. 14. On March 4, 2019, Mr. Disher responded that Plaintiffs would not supplement their responses and production because there are no genuine issues of material fact that require additional factual development in the case. *See* Ex. 9. That same day, Mr. Disher emailed Plaintiffs' responses and objections to Defendant-Intervenors' Interrogatories Nos. 18-21 and Request for Production No. 8 and refused to produce any discovery as to these requests either. *See* Ex. 16. On May 10, 2019, I emailed Mr. Disher to ask for Plaintiffs' position on Defendant-Intervenors' motion to compel Plaintiffs' answers to Interrogatories Nos. 4-15 and 18-21 and production in response to Requests for Production Nos. 2 and 8, and request to dismiss the non-Texas Plaintiffs and postpone all deadlines. That same day, Mr. Disher responded: "The discovery requests referenced below appear to seek information related to potential injuries suffered by the Plaintiff States. The evidence that the Plaintiffs States rely on to establish their standing at this stage is cited in their motion for summary judgment. Is there a reason why Intervenors cannot fully respond to that cited evidence (or argue that such cited evidence is insufficient) rather than attempt to seek discovery related to potential injuries not cited in the motion for summary judgment?" I responded to Mr. Disher that Defendant-Intervenors need responses to our discovery requests. Mr. Disher responded that Plaintiffs stand on their objections but would "discuss" any "specific information that [Defendant-Intervenors] believe [they] are lacking in order to file a complete response to the cited evidence" in Plaintiffs' motion for summary judgment. On May 13, 2019, I emailed Mr. Disher again explaining that the information Defendant-Intervenors believe is lacking is set out in their deficiency letter from February 1 and fifth set of discovery requests. Mr. Disher did not produce any discovery but responded, again, that Plaintiffs would "discuss" evidence Defendant-Intervenors believe is "require[d] in order to respond to the evidence cited in the motion for summary judgment."

I also hereby certify that on May 14, 2019 I conferred with counsel for Defendant-Intervenor New Jersey on this motion and New Jersey does not take a position on the motion. Also on May 14, 2019, counsel for Defendant-Intervenors emailed Jeffrey Robins, counsel for Federal Defendants, to confer on the motion. As of the filing of the motion, Federal Defendants have not responded.

/s/ Nina Perales
Nina Perales

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on the 14th day of May, 2019, I electronically filed the above and foregoing document using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

/s/ Alejandra Ávila
Alejandra Ávila